

Conversely, claimant contends he proved through his testimony and the medical records and reports admitted into evidence at the preliminary hearing that the heavy repetitive work activities he performed for respondent on March 19, and 20, 2002, aggravated and accelerated his preexisting low back condition. Claimant contends his current need for medical treatment and the reason he is unable to work is because of this aggravation. Claimant requests the Board to affirm the ALJ's preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Board finds that the preliminary hearing Order for Compensation should be affirmed.

Claimant has a history of low back problems dating back to 1981 when he was diagnosed with a large extruded disc at L5-S1. On April 6, 1981, claimant underwent a hemilaminectomy at L5-S1 together with the excision of the large extruded disc. The surgery was successful and claimant was able to return to performing physical labor jobs and various sporting activities. But commencing in 1985, claimant has had at various times recurring low back symptoms.

Claimant started working for respondent in 1994 and worked as a full-time warehouse worker from 1996 to February 2000. Claimant's job duties as a warehouse worker required him to lift 45 to 50 pound boxes on a repetitive basis. Claimant testified and the medical records verified that he had recurring low back problems during the years he performed the heavy warehouse job. Because of the recurring low back problems, claimant transferred to a "three knife trimmer operator" which was a much less physically demanding job. Claimant had very few problems with recurrent back problems while performing that job.

But on March 19, 2002, although respondent knew about claimant's preexisting back problems, respondent temporarily transferred claimant back to the heavy warehouse job. At the end of the day on March 19, 2002, claimant was experiencing pain and discomfort in his low back. Claimant returned to work on March 20, 2002, and again the heavy work caused claimant to have pain and discomfort in his low back. By the time the claimant's shift was over, claimant testified, "I would have to get down on my knees to stack the boxes and 3:30 I hobbled my way out to the car and went home."¹

Claimant was not able to return to work on March 21, 2002, because of his continuing pain and discomfort in his low back. Claimant attempted to see his personal physician Thomas Hamilton, D.O. But Dr. Hamilton could not see him. Dr. Hamilton's medical records, however, indicate that claimant called with low back complaints and pain going down his left leg to his knee. During the telephone conversation, claimant requested a medical excuse from work for March 21 and March 22. Claimant's wife picked up the medical excuse and delivered the excuse to the respondent.

Claimant finally saw Dr. Hamilton on March 25, 2002. Dr. Hamilton's March 25, 2002, Patient Examination Form indicated claimant gave a history of back pain with NKL (no known injury) and bilateral leg and hip pain. The form goes on to note, "Pain down leg

¹ Preliminary Hearing, May 24, 2000, p. 15.

to ankle lifting 50 pounds at work.”² On March 26, 2002, Dr. Hamilton took claimant off of work until April 3, 2002. Claimant returned to the respondent with the off-work slip plus a request to be disqualified from the warehouse job due to his chronic back pain. At that time, respondent terminated claimant from its employment.

At claimant’s attorney’s request, claimant underwent an independent medical evaluation by Douglas M. Rope, M.D. of Leawood, Kansas. Dr. Rope saw claimant on May 15, 2002. Dr. Rope had claimant’s previous medical records to review, took a history from claimant and conducted a physical examination of claimant. Dr. Rope’s impression was left sided lumbar radiculopathy most probably at L5-S1 level and secondary to trauma at work on March 19, 2002. Dr. Rope’s additional diagnosis was status post-intervertebral disc herniation with right-sided radiculopathy at the L5-S1 level in 1991 and status post discectomy. Dr. Rope opined that claimant’s current low back problem must be assumed to have been precipitated by claimant’s heavy physical activity in March 2002. The doctor placed restrictions on claimant’s activities. He also recommended claimant continue to take pain medication and in the future claimant may require additional medical treatment including epidural steroid injections or surgery.

Respondent sent claimant for an independent medical evaluation by Chris D. Fevurly, M.D. of Lawrence, Kansas. Dr. Fevurly saw claimant on May 22, 2002. Dr. Fevurly also had claimant’s previous medical records to review, took a history from claimant and conducted a physical examination of claimant. Dr. Fevurly’s assessment was that claimant developed recurrent lumbar pain upon returning to the heavy warehouse job duties on March 19, 2002. But Dr. Fevurly opined that the neurologic deficit that claimant experienced in his left leg had no likely causal relationship to the work event on March 19, 2002, due to lack of a temporal relationship. Dr. Fevurly went on to opine that claimant likely had an acute exacerbation of his chronic low back pain and degenerative arthritis. But this had improved and essentially had resolved.

At the May 24, 2002, preliminary hearing, claimant testified he remained symptomatic and as a result of those continuing symptoms he could not return to work. The continuing symptoms resulted in his inability to sit or stand for any length of time. Claimant also testified he had trouble walking and gave the example he could not walk the other night some 75 yards from the parking lot to the store.

The Board concludes that claimant’s testimony coupled with the medical records of Dr. Hamilton and the independent medical evaluation report of Dr. Rope are persuasive and prove that the heavy work activities claimant had to perform on March 19 and March 20, 2002, aggravated claimant’s preexisting low back condition. That aggravation resulted in a new injury and claimant’s current need for medical treatment and the reason claimant is unable to work. In a worker’s compensation case, when a work-related activity aggravates or accelerates a preexisting condition, the injured employee’s resulting injury

² Preliminary Hearing, May 24, 2002, Claimant’s Exhibit 1.

is compensable. The test is not whether the job-related activity caused the condition but whether the job-related activity aggravates or accelerates the condition.³

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's May 30, 2002, preliminary hearing Order for Compensation is affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

c: John Ostrowski, Attorney for Claimant
Bret C. Owen, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation

³ See Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* ____ Kan. ____ (2001).